(b)(6)

**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

DATE: MAY 30 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was a psychiatry resident at Washington, D.C., and a post-doctoral research fellow at affiliated with New York, New York. She indicated on the Form I-140 petition that she seeks employment as an "Internal Medicine Resident" at The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner a brief from counsel and supporting materials.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*In re New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 25, 2012. The petition included several witness letters. The most detailed letter is from Professor [redacted] who stated:

> At present, [the petitioner] is one of the experts on the intersection of appetite-related hormones, neuroimaging, and bariatric surgery. . . . Her specific focus in studies is on key appetite-related hormones and how the brain's processing of these hormones

change for patients undergoing bariatric surgery. She is seeking to identify the neural activity related to energy balance regulation, hunger, satiety, food craving, reward and other aspects of eating, as well as other brain-influenced factors related to food intake and weight loss/weight control.

Ultimately, she is seeking to elucidate the neural – that is, brain pathway – mechanism of sustained weight loss and improved metabolism after various bariatric surgical procedures. By studying postsurgical changes in brain function and processing of gut hormone levels, she is seeking to better understand the mechanisms of brain function following surgically-induced weight loss. . . .

We have data suggesting that the characteristics of gut peptide production change following bariatric surgery, and we are now trying to investigate how the brain processes these changes. While at present, her studies relate solely to patients who have decided to undergo bariatric surgery, the more far-reaching benefit would be if we could replicate this mechanism through nonsurgical means, as that would provide a much more desirable, promising, and cost-effective means to address and treat the problem of obesity. . . .

[The petitioner] is engaged in extensive efforts to image the brain[s] of obese individuals both before and after bariatric surgery. . . .

First, in the inception phase of this study, she was the Project Manager. She was responsible for the training and recruitment of research staff, the enrollment of patients into the study, data analysis, project design, and the evaluation of the project goals. . . . Second, now that this project is firmly underway, she serves [as] a Co-Investigator with lead responsib[ility] for the ongoing design of the various experiments and development of methodology, the neuroimaging procedures and analysis, and the publication of manuscripts.

Dr. [redacted] associate professor at [redacted] and director of its Weight Control Center, stated:

I worked closely with [the petitioner] on a collaborative project that spanned over a year. Together, we analysed and interpreted data from a pilot study examining the efficacy of cabergoline, a dopamine receptor agonist and dietary modification, on body weight and glucose tolerance in obese non-diabetic persons without hyperprolactinema. She provided significant intellectual contributions to the proposed work and played a critical role in the writing up of this original research project. . . .

> She has made other multiple contributions of great significance to obesity and diabetes research. Numerous other researchers in the field have cited her publications on neuroimaging and obesity. . . .
>
> [The petitioner's] research is incredibly fundamental and offers hope towards developing anti-obesity therapies. Her research displays a rare brilliance and dedication, and I believe that she will continue to make a significant impact on the health of obese and diabetic patients in the US.

To support Dr. assertion that "[n]umerous other researchers in the field have cited her publications on neuroimaging and obesity," the petitioner submitted evidence of moderate independent citation of three of her articles.

Professor London, United Kingdom, stated:

> I have known [the petitioner] since 2005, when she began to work in my lab at the end of her first year of medical training. . . .
>
> [The petitioner] has made very important original research contributions to our understanding of obesity. . . . [E]xamining the neurotransmitters involved in appetite and food intake, such as dopamine, may also lay the groundwork for effective weight loss treatments and help translate knowledge to clinical practice.
>
> Among the many investigators that I have had the opportunity to meet and to observe in over 40 years in biomedical research, [the petitioner] clearly stands out as being one of those at the very top of her field.

Dr. a manager-scientist at the Netherlands, stated:

> I collaborated with Dr and had the distinct pleasure of working with [the petitioner] on an industry-funded project. The objective was to assess objective measures of gastric volume/distension with CT scan technology alongside subjective appetite ratings pre and post consumption of a Slim Fast meal replacement shake. . . . [The petitioner's] outstanding efforts and expertise led to the acquisition of significant findings that assisted in the development of successful weight loss therapies.

Professor and past president of the stated: "I have paid great attention to her research comparing Body Adiposity Index (BAI) and Body Mass Index (BMI), as she has been among the first to compare BAI with BMI and their correlations with measures of body fat, waist circumference (WC), and indirect indices of fat (leptin, insulin) pre- and post-Roux-en-Y Gastric

Bypass (RYGB)." Prof. deemed the petitioner's current research to be "highly important work."

Numerous witnesses have encountered the petitioner at various professional conferences. For example, Dr. executive director of , Baton Rouge, and a past president of the is "impressed with [the petitioner's] contributions to the field and outstanding research activities as they relate to appetite control and changes in body composition pre and post bariatric surgery."

As another example, Dr. senior clinician scientist at stated that the petitioner's "work has certainly had a distinctive impact on our field. . . . She has proven herself to be a scholar and a researcher of exceptional skill and insight."

In a request for evidence issued on August 29, 2012, the director acknowledged the witness letters and evidence that accompanied the petition. The director instructed the petitioner to submit further evidence to establish her influence on the field. Among examples of acceptable evidence, the director stated that the petitioner could submit "[e]vidence demonstrating that her developments are being applied in the field" or evidence that her rate of citations "is above average for her field."

In response, the petitioner submitted a second letter from Prof. who stated: "for the type of federally funded high-level research of national significance that we are conducting, hiring a minimally qualified applicant would not be appropriate or consistent with our existing hiring patterns." No statute, regulation, or case law supports the assertion that, because a research institution receives federal funding, its "existing hiring patterns" supersede the statutory job offer requirement. Under *NYSDOT*, eligibility for the waiver is "specific to the alien" (*id.* at 217); there are no institutional blanket waivers, and no institution can declare itself exempt from the relevant statutory provisions.

Similarly, there is no precedent for the assertion that federal grant money establishes that participants in funded projects presumptively qualify for the national interest waiver. Medical researchers are members of the professions, and therefore subject to the job offer requirement. The petitioner submitted no information from the NIH to establish that provision of grant funding is a rare event that warrants special consideration, rather than a core or routine function of the NIH.

The director denied the petition on November 1, 2012. The director quoted several witness letters, described other exhibits, and acknowledged that the petitioner had published her work in journals and presented it at conferences. The director found that the petitioner had not submitted objective evidence to distinguish her research from that of other qualified researchers in the field.

On appeal, the petitioner documents dozens of further citations of her work, showing that the total number had more than tripled since the initial filing date. Owing to the length of time involved in preparing, submitting, reviewing, and publishing articles, the researchers making these citations

were already relying on the petitioner's work at the time she filed the petition. The substantial and accelerating citation rate of the petitioner's published work corroborates the witnesses' claims of widespread reliance on the petitioner's work. The evidence submitted on appeal continues a pattern already established in prior submissions.

Eligibility for the national interest waiver does not rest on the overall importance of a given field of endeavor, or on the prestige of a particular employer. It rests, instead, on the merits of the individual alien. In this instance, the evidence in the record establishes the widespread and expanding influence of the petitioner's research work. The benefit of retaining the petitioner's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will withdraw the director's decision and approve the petition.

**ORDER:** The appeal is sustained and the petition is approved.